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No. 03-1119

IN THE

Supreme Court of the United States

DONALD E. MORRIS,
Petitioner,

v.

DONALD H. RUMSFELD, Secretary,
United States Department of Defense,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has determined that the Petitioner's impairment of epilepsy should not be considered a disability under the Rehabilitation Act in accordance with *Sutton v. Lader*, 185 F.3d 1203 (11th Cir. 1999).

2. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has failed to follow precedent as established in *Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, opinion modified on rehearing, 30 F. 3d 1347 (11th Cir. 1994).

3. Whether the Eleventh Circuit's decision conflicts with this Court's decisions in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 156 L.Ed. 2d 84 (2003).

PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

In compliance with the provisions of Rule 14.1(b), the Petitioner represents to the Court that Rule 29.6 is not applicable to this case because the Defendant is a public official of the government of the United States. Also, all of the parties to the proceeding are named in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES, PARENT COMPANIES, AND SUBSIDIARIES	ii
TABLE OF CITED AUTHORITIES	iv
CITATIONS OF OPINIONS AND ORDERS	1
CONCISE STATEMENT OF GROUNDS FOR JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
I. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW	3
STATEMENT OF THE FACTS	3
JURISDICTION OF THE COURT OF APPEALS	8
ARGUMENT	8
I. REHABILITATION ACT	8
II. ADEA, TITLE VII, AND WHISTLEBLOWER CLAIMS	10
CONCLUSION	12
APPENDICES	1a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 11
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11
Cox v. Administrator U.S. Steel and Carnegie, 17 F.3d 1386, opinion modified on rehearing, 30 F.3d 1347 (11th Cir. 1994) ..... i, 11
Desert Palace, Inc. v. Costa, 123 S.Ct. 2148, 156 L.Ed. 2d 84 (2003) ..... i, 11
McShane Contracting Co. v. Fidelity and Guaranty Co., 61 F.R.D. 428 (D.C.P.A. 1973) .. 11
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) ..... i, 11, 12
Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999) ... i, 8

OTHER AUTHORITIES

5 U.S.C. § 2301 3
5 U.S.C. § 2302(b)(8) 2, 10
5 U.S.C. § 7701-7702 3
28 U.S.C. § 1254(*l*) 2
29 U.S.C. § 621, *et seq.* 3
29 U.S.C. § 794, *et seq.* 3
42 U.S.C. § 12102, n. 13 9
42 U.S.C. § 12101, *et seq.* 2, 3, 9
Random House Webster's Unabridged Dictionary (1997) 9
Oxford World Encyclopedia (2001) 9
Gould's Medical Dictionary 9

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CITATIONS OF OPINIONS AND ORDERS

The opinions and orders of the United States District Court for the Middle District of Alabama are not reported, and are set out at Appendix C (App. 13a) and Appendix D (App. 38a). The order of the Court denying rehearing is not reported, but set out at Appendix E (App.39a).

The opinion of the Eleventh Circuit Court of Appeals is reported at 82 F. Appx. 215, (Table/2003 WL 22075714 (11th Cir. [Ala.]), August 15, 2003 and is set out at Appendix A (App. 1a), and the decision of that Court on rehearing is set out at Appendix F (App. 41a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated August 15, 2003, and the decision on rehearing and rehearing *en banc* is dated November 3, 2003.

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. §1254(1). Rule 10(a) of the Rules of this Court provides for review of a United States Court of Appeals' decision that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rule 10(c) also provides for review in this Court of decisions of the Courts of Appeals that have decided important questions of federal law in a way that conflicts with relevant decisions of this Court.

This case involves questions within those standards through issues as to whether the Court of Civil Appeals has erroneously upheld the issuance of summary judgment when the Petitioner has refuted those reasons proffered by the Respondent, thereby challenging the credibility of such reasons.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

5 U.S.C. § 2301; 5 U.S.C. § 2302(b)(8); 5 U.S.C. §7701; 5 U.S.C. § 7702; 29 U.S.C. § 621, *et. seq.*; (*see* App. G, 42a-60a); 29 U.S.C. § 794, *et. seq.*; 42 U.S.C. § 12101, *et. seq.*

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This case was initially filed on March 23, 2001, by Donald E. Morris against Donald H. Rumsfeld, Secretary, United States Department of Defense, to seek redress for action violative of the provisions of the Americans with Disabilities Act,[1] 42 U.S.C. §12101 *et seq.*, for action violative of the provisions of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et. seq.*, for action violative of the Rehabilitation Act of 1974, 29 U.S.C. §794 *et. seq.*, and for action violative of reprisal for whistle-blowing, 5 U.S.C. § 2301. (R1-1). This case consists of allegations permitted under the "mixed case complaint" provisions of 5 U.S.C. §§ 7701-7702. (R1-1, 6, 7, 8).

The Defendant, Donald H. Rumsfeld, as Secretary, United States Department of Defense, filed an Answer (R1-11), and a motion to dismiss, or in the alternative for summary judgment, (R1-22), later supplementing that motion. (R2-32). The Plaintiff responded to that supplemented motion (R2-39), and the trial court entered summary judgment for the Defendants on December 4, 2002. (R2-45). A timely post-trial motion under Rule 59 was filed on December 18, 2002 (R3-47), which was subsequently denied on January 2, 2003. The Plaintiff timely filed his Notice of Appeal on January 14, 2003. (R3-49).

An Eleventh Circuit panel decision, upheld, *per curiam*, the District Court's ruling on August 15, 2003, and denied Petitioner's Application for Rehearing on November 3, 2003.

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[1] In its memorandum order of August 15, 2003, the appellate court held that a federal employee has no remedy for employment discrimination under ADA.

STATEMENT OF FACTS [2]

At the age of 50, Plaintiff Morris began employment with the Defense Commissary Agency ("DeCA") at its inception in 1991. In 1992, Morris was diagnosed with epilepsy. The DeCA, an agency within the Department of Defense, is responsible for managing the federal government's commissaries. During his employment with DeCA, Morris worked in several supervisory positions, most recently as the Zone Manager for the Eastern Division of the Southern Region. As Zone Manager, Morris supervised eleven commissaries and eight commissary officers in Alabama, Georgia, and Tennessee, and worked out of an office at Maxwell Air Force Base, Alabama.

Beginning in approximately January 1998, Morris's immediate supervisor was Owen Chet Boutelle. In July 1998, Boutelle completed Morris's performance evaluation and rated him as having "exceeded" expectations in five "critical" areas of his job responsibilities. After that, Morris's performance evaluations worsened, prompting him to file several grievances and EEO complaints.

In January 1999, supervisor Boutelle completed a mid-year evaluation of Morris. The form contained two possible ratings, "acceptable, or better" and "less than acceptable." Boutelle rated Morris as "acceptable, or better" and circled the word "better." However, Boutelle noted that Morris needed to watch his overtime usage and improve in the areas of produce and meat accountability. Morris disagreed with Boutelle's assessment and filed an informal grievance against Boutelle seeking to have the comments removed from his personnel file.

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[2] Excerpt as otherwise indicated, the facts herein reported are essentially drawn from those recited by the appellate court in its memorandum order of August 15, 2003, supporting is judgment in favor of the Defendants as to all claims, with insubstantial changes.

In February 1999, Boutelle sent an e-mail to Morris stating that payrolls at Morris's stores were excessive and "out of control." Two months later, in April 1999, Morris and Boutelle disagreed on a personnel matter regarding a managerial staff member at a commissary under Morris's control. As a result of this disagreement, Morris sent an e-mail to Boutelle in which Morris stated that Boutelle's decision was "the epitome of micro-management in anyone's book."

On April 23, 1999, Boutelle gave Morris a Memorandum of Warning, to reprimand him for his "confrontation" e-mail and "lack of respect" for Boutelle's decision-making authority. Further, Boutelle stated his concern about Morris's "continued lack of accessibility" and the fact that "[t]here ha[d] been numerous occasions over the past few months" when staff members were unable to contact Morris. Also on April 23, 1999, Boutelle presented Morris with a Warning of Unacceptable Performance and Notice of Opportunity to Demonstrate Acceptable Performance ("PIP"). The PIP was based on two allegedly deficient areas of Morris's job performance. First, one of Morris's stores recently had received a low inspection rating. Second, "four to six stores" under Morris's charge had inventory losses exceeding those allowable under the applicable regulations and, thus, were "out of tolerance." The PIP stated that Morris had 90 days to fix the performance issues, and that at the end of the 90-day period, Boutelle would update Morris as to the status of his performance. The PIP further stated that if Morris did not improve, Boutelle would take formal action, including reassignment, demotion, or removal.[3]

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[3] At the same time that Boutelle gave Morris the PIP, Boutelle also gave a PIP to Bonnie Kanitz, another Zone Manager. Kanitz's zone also was "out of tolerance." Kanitz's PIP contained identical language to Morris's PIP with respect to the action Boutelle might take if Kanitz's performance remained unsuccessful. At the end of the 90-day period, Kanitz's zone was determined to be within tolerance, and she received no further action.

After Boutelle gave Morris the PIP, Morris filed two informal grievances with Boutelle, one regarding the PIP and one regarding the Memorandum of Warning. Essentially, Morris stated his belief that the PIP and the Memorandum of Warning were efforts to force him to retire and were in retaliation for the informal grievance he had lodged after his 1999 mid-year evaluation. Morris eventually filed formal grievances and an EEO complaint regarding the PIP and the Memorandum of Warning. In his EEO complaint, Morris stated his belief that he was being discriminated against based on his age. In 1999, Morris was 58 years old.

On May 4, 1999, Morris filed an informal grievance with Charles M. Wiker, Boutelle's immediate supervisor, stating that Wiker himself had behaved in a "rude, embarrassing and humiliating" manner toward Morris during a confrontation on May 3, 1999, in front of one of Morris's commissary stores. Morris also filed a formal grievance regarding the incident.

On May 14, 1999, Morris filed a grievance with the DeCA Inspector General in which he set forth complaints about his superiors' "threatening" and "intimidating" behavior, as well as their "rude and offensive language." Further, Morris reported that he knew of (1) managers abusing their position in the selection of individuals for jobs, (2) one manager who coerced a commissary officer into buying tax-free cigarettes, and (3) one area vice president who was aware of misuse of a vehicle and did nothing about it.

On July 30, 1999, Boutelle extended Morris's PIP by 30 days, stating that he was concerned that Morris's "use of leave during this opportunity period," which had been greater than normal due to family issues, "will not allow a fair assessment of your progress."[4] At the conclusion of the 30-day period, Boutelle still was not satisfied with Morris's

[4] On August 30, 1999, Morris filed an EEO complaint alleging that the extension of the PIP program was a result of age discrimination.

performance, and he issued Morris a "Notice of Proposed Demotion," recommending that Morris be demoted temporarily to a non-supervisory position. Morris retained his grade and salary, and his position of record did not change.

As a result of his temporary demotion, Morris began working for Robert Vitikacs on October 12, 1999.[5] On November 15, 1999, Morris submitted a written request for sick leave from November 12, 1999, through November 26, 1999. Vitikacs disapproved the leave request, stating that Morris had not submitted adequate medical documentation. Morris then provided a medical excuse, which Vitikacs rejected. On November 22, 1999, based on additional information from Morris's physician, Vitikacs approved the request and granted Morris leave until November 30, 1999.[6] Rather than return to work, however, Morris gave Vitikacs a written notice on November 29, 1999, that he was retiring effective November 30, 1999.[7]

In addition to the foregoing facts, Morris contends that at management meetings, Boutelle questioned various individuals, including Morris, about their retirement plans. Morris alleges that, when discussing retirement plans, Boutelle would "look right at [him]," which indicated to Morris that Boutelle "was sending [him] a signal that he wanted [Morris]

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[5] On October 13, 1999, Morris filed a compliant with the Office of Special Counsel in Washington D.C., claiming that his demotion was in "reprisal for whistleblowing actions." Morris also filed an EEO complaint regarding his temporary demotion. This EEO complaint was consolidated with his August 30, 1999, EEO complaint.

[6] During the timeframe that Morris worked for Vitikacs, Boutelle denied Morris a within-grade pay increase because Morris did not have a fully successful or better rating of record for the last performance appraisal cycle.

[7] In December 1999, Morris amended his August 30 and October 13 EEO complaints to contain a claim of constructive discharge. At this time, Morris referenced not only his age, but also his epilepsy.

to retire." Further, Morris contends that his epilepsy was a cause of the unfavorable treatment he received. Morris first revealed his condition to DeCA in 1998 when he submitted a form to his supervisor, who preceded Boutelle, and to the Defense Logistics Agency. Then, in August 1999, Morris forwarded the same form to the personnel department at Maxwell Air Force Base. Morris never discussed his epilepsy with Boutelle, but speculates that Boutelle know about it.[8]

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals for the Eleventh Circuit had jurisdiction of this cause in the first instance under 42 U.S.C. § 1291 because it involved an appeal from a decision of a United States District Court sitting within its Circuit.

ARGUMENT

I. REHABILITATION ACT

According to the Eleventh Circuit's own precedent, a *prima facie* case under the Rehabilitation Act is made upon the plaintiff showing "(1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability." *Sutton v. Lader*, 185 F.3d 1203, 1207 (11th Cir. 1999). The Petitioner has most certainly demonstrated that his condition of epilepsy along with the underlying facts, as applied to *Sutton,* without question qualifies as a disability under the Rehabilitation Act.

For an impairment to be classified as a "disability" under the first requirement of *Sutton*, the Petitioner would have to show (1) that a physical or mental impairment exists that substantially limits one or more major life activities, (2) that person "has a record of such impairment," or (3) the person

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[8] Boutelle, Wiker, and Vitikacs claim that they did not know that Morris suffered from epilepsy.

"is regarded as having such an impairment." *Sutton* at 1208, *citing* 29 U.S.C. §706(8)(B). Though Petitioner has clearly set forth evidence demonstrating that his impairment is classifiable as a disability under at least two if not all three of the possibilities, the Eleventh Circuit has refused to accept such evidence as sufficient.

With regard to the first avenue of establishing the existence of a disability, there exists no question that the Petitioner's condition of epilepsy is an impairment falling within the universal definition of a disability that would limit one or more major life activities, as it is defined as being "a disorder of the nervous system, characterized either by mild, sporadic loss of attention or sleepiness, or by severe convulsions with loss of consciousness." *See* Random House Webster's Unabridged Dictionary (1997). Similarly, it is defined in the Oxford World Encyclopedia (2001) as follows:

> Disorder characterized by abnormal electrical discharges in the brain which provoke seizures. It is seen both in generalized forms, involving the whole of the CEREBRAL CORTEX, or in the partial (focal) attacks arising in one small part of the brain. Attacks are often presaged by warning symptoms, the "aura". Seizure types vary from the momentary loss of awareness seen in *petit mal* attacks ("absences") to the major convulsion of *grand mal* epilepsy. They may be triggered by a number of factors, including sleep deprivation, flashing lights or excessive noise. All forms of epilepsy are controlled with anticonvulsant drugs.

Gould's Medical Dictionary defines "epilepsy" as follows:

> A disorder of the brain characterized by a recurring excessive neuronal discharge, manifested by transient episodes of motor, sensory, or psychic dysfunction, with or without unconsciousness or convulsive movements. The seizure is associated with marked changes in recorded electrical brain activity.

In addition, epilepsy is normally considered an impairment qualifying as a disability under 42 U.S.C. §12101, *et seq.* *See* 42 U.S.C. §12102, n. 13.

Despite undisputed evidence that the Petitioner's direct supervisor was provided with documentation outlining Petitioner's medical condition of epilepsy, the Eleventh Circuit held that the Petitioner failed to show the existence of disability under the definition of disability. Logic would seem to allow such documentation to be characterized as having a "record of such impairment". In fact, the Respondent concedes that in 1998 and 1999, the Petitioner sent facsimile messages to DLA, Boutelle, and to the personnel office, informing such parties of his condition. (R1-23-47). However, though the Respondent concedes that such messages were indeed sent, the Respondent apparently argues in essence that such were not read or interpreted by Boutelle, Wiker, nor Vitikacs, and therefore the Petitioner should be estopped from asserting that he had made the necessary parties aware of his condition sufficiently enough to entitle him to have made a "record of such impairment". The Eleventh Circuit has refused to accept such messages as qualifying as a "record", though Petitioner has shown that such record was sent and that the Respondent admits receiving such record.

The Petitioner also qualifies for the third possibility, that being "regarded as having such impairment". Certainly there is sufficient evidence for a reasonable person to conclude that Morris' condition and detailed medical record, along with the universal understanding of epilepsy itself, would cause him to be "regarded" as being impaired.

II. ADEA, TITLE VII, AND WHISTLEBLOWER CLAIMS

All parties, as well as the Eleventh Circuit concede, that the Petitioner has established a *prima facie* case of age discrimination under the ADEA and of retaliation under the

ADEA, Title VII, and 5 U.S.C. §2302(b)(8). In offering his reasons to discredit the Respondent's articulations of justification, the Petitioner demonstrated that such proffered reasons were merely a pretext for discrimination. Those reasons, as offered by the Respondent, include (1) allegations of poor performance when evidence supported a history of good performance, (2) complaints that his stores were "out of performance" when documentation proved otherwise, and (3) failure to properly supervise and control his commissary officers, when all such officers were rated as either "outstanding" or "excellent" by Boutelle and Wiker themselves. Such inconsistencies in the evidence can support a conclusion that a genuine issue of fact exists. *See McShane Contracting Co. v. Fidelity and Guaranty Co.*, 61 F.R.D. 428 (D.C.P.A. 1973).

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court held that when an employer asserts reasons that are made subject to credibility issues, summary judgment is inappropriate. *See also Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, *opinion modified on rehearing*, 30 F.3d 1347 (11th Cir. 1994) (If a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, a court should deny a motion for summary judgment). Courts are prohibited from weighing the evidence and must deny the motion if the evidence, including all inferences therefrom, is such that a finder of fact could decide the material issues in favor of the non-moving party. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). This Court has most recently held in *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), that direct evidence of discrimination is not required in order to prove employment discrimination in mixed-motive cases under Title VII. *Id.*

Clearly the proffered reasons call into question the credibility of the Respondent's asserted defenses, when facts were in issue plainly and without question refuting the offered defenses. However, the Eleventh Circuit has concluded that while each proffered justification by the Respondent was refuted by Petitioner with unquestionable documentation, those proffered reasons remain invulnerable to credibility issues. Certainly this Court, under the *Reeves* rationale, would not allow the proffered reasons offered by the Respondent to remain immune from credibility issues. The Eleventh Circuit has erred in upholding the District Court's order on summary judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant this petition and issue it a Writ of Certiorari to the United States Court of Appeals requiring it to review its decision, reverse the judgments of the district court, and remand the case to that court for further proceedings.

Respectfully submitted,

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